88-464

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Petitioners,

v.

CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY,
FRVR CORPORATION, and the
INTERSTATE COMMERCE COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED *

1. Do the United States District Courts have jurisdiction to determine what working conditions constitute the status quo when those courts are called upon to enforce the command of the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, that a carrier maintain unchanged those working conditions out of which a dispute arose where the carrier asserts that it has a contractual right to change those actual, objective working conditions?

2. Do the United States District Courts, in enforcing Section 2 Seventh of the Railway Labor Act, 45 U.S.C. § 152 Seventh, and Section 8 of the Norris-LaGuardia Act, 29 U.S.C. § 108, have jurisdiction to examine the merits of a rail carrier's reliance on collective bargaining agreements and past practice in defending against a claim that it has unilaterally changed working conditions as embodied in agreements by selling a rail line without first bargaining over the impact of that sale on employees?

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* Petitioners in this case include the Railway Labor Executives' Association and fourteen labor organizations; those individual labor organizations are listed on Appendix E attached hereto at 50a and are marked by asterisks on that Appendix. Another organization, the International Association of Bridge, Structural and Ornamental Ironworkers was an appellant when this case was in the court of appeals, but is no longer involved in this case since none of its members will be affected by this sale. Petitioners maintain that that organization, which is not an RLEA member organization, no longer has an interest in the outcome of this petition.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Railway Labor Executives' Association [hereinafter, "RLEA"] [1] and the fourteen (14) individual labor organizations [2] which are also petitioners herein, respectfully request that this Court issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review the decision of that Court which was entered on August 23, 1988, in *Chicago &*

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[1] RLEA is an unincorporated association of the Chief Executive officers of nineteen (19) labor organizations which collectively represent virtually all organized rail employees in this Country. RLEA's member organizations are listed on Appendix E at page 50a.

[2] *See*, note * at page i.

North Western Transportation Co. v. RLEA, 7th Cir. No. 88-1504.

OPINIONS BELOW

Although the decision of the court of appeals is not yet officially reported, it is reproduced herein as Appendix A at pages 1a-22a. The judgment of the court of appeals, which was entered on August 23, 1988, is reproduced herein as Appendix C at pages 33a-34a. The district court did not issue a written opinion, but rendered its ruling orally on March 16, 1988; that oral ruling is reproduced herein as Appendix B at pages 24a-32a.

JURISDICTION

The court of appeals entered its ruling on August 23, 1988, affirming the grant of a preliminary injunction by the district court; petitioners have not sought rehearing. This petition is timely since it was filed within the ninety (90) day time period established by 28 U.S.C. § 2101(c). Petitioners are seeking to invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves the interpretation of Sections 2 First, 2 Seventh, 3 and 6 of the Railway Labor Act (45 U.S.C. §§ 152 First, 152 Seventh, 153 and 156) and Section 8 of the Norris-LaGuardia Act (29 U.S.C. § 108). Specifically, the questions presented center around whether the federal courts have jurisdiction to enforce the notice, bargaining and status quo commands of the Railway Labor Act, when a rail carrier asserts that its actions are authorized by various collective bargaining agreements. The above statutory provisions, as well as Section 2 of the Norris-LaGuardia Act, 29 U.S.C. § 102, which is involved in construing Section 8 of the anti-injunction Act, are reproduced herein as Appendix D at pages 35a-49a.

STATEMENT OF THE CASE

In early 1986, respondent Chicago & North Western Transportation Company [hereinafter, "C&NW"] operated approximately 7,000 miles of rail lines in the midwestern portion of the country and employed around 9,000 employees to perform those operations. *See*, Appendix A at 2a; Sup. Ct. No. 87-2049, Pet. at 3. That rail system is substantially smaller, both in mileage and in manpower, than the rail system which the C&NW had operated in the late 1960's, for during the past twenty (20) years respondent has reduced its rail system by abandonments,[3] and recently, its employment levels by furloughs.[4] Brief for C&NW in 7th Cir. No. 88-1504 at 2. Prior to 1986, that reduction in route miles was accomplished by abandonments of unprofitable rail lines under the procedures established in 49 U.S.C. §§ 10903 and 10904. RLEA Brief in 7th Cir. No. 88-1504 at 4. However, as the records both in this case and in No. 87-2049 show, respondent C&NW considered the abandonment process to be unsatisfactory to achieve its goal of adequate profitability, primarily because the abandonment process, which requires the approval of the Interstate Commerce Commission [hereinafter, "ICC" or "Commission"] under 49 U.S.C. § 10903, was time consuming, was frequently subjected to shipper and community objections, and required the C&NW to provide what it characterized as being "incredibly expensive and onerous" benefits to its employees who may be affected by the abandonments. Transcript of March 15, 1988 [hereinafter, "Tr."] at 4; 49 U.S.C. § 10903(b)(2). Whenever the C&NW reduced its mileage by abandonment prior to 1986, the ICC required it to provide all employees affected by the abandonments with monetary and other benefits over and

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[3] Respondent asserts that in "the past 20 years, C&NW has abandoned about 6,000 miles of track . . . ." Brief for C&NW in 7th Cir. No. 88-1504 at 2.

[4] Respondent asserts that it has "reduced its workforce by 41% since 1981 alone." Brief for C&NW in 7th Cir. No. 88-1504 at 2.

above the provisions set forth in its collective bargaining agreements with petitioners.

Responding to the ICC's relaxation of its policies concerning employee protections, respondent C&NW decided in 1985 to "embrace line sales to non-carrier operators [under 49 U.S.C. §§ 10505 and 10901] as a method for preserving marginal lines, recovering its capital assets, and simultaneously preserving an opportunity to participate in the traffic." Tr. at 7. Other favorable aspects of the line sale method for reducing its system were that line sales enabled respondent to dispose of marginally profitable (as contrasted with unprofitable) lines and to do so without being subject to ICC-imposed conditions to protect the interests of employees. *Compare, Durango & Silverton Narrow Gauge R.R.—Acquisition and Operation*, 363 I.C.C. 292 (1979), *with, Ex Parte No. 392 (Sub-No. 1), Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901* [hereinafter, *"Ex Parte 392"*], 1 I.C.C.2d 810, 815 (1985), *aff'd sub nom. Illinois Commerce Comm. v. ICC*, 817 F.2d 145 (D.C. Cir. 1987) (table).

Respondent first implemented this new approach to reducing its system in 1986 when it sold 826 miles of its rail system, and transferred an additional 139 miles of track, to a newly-formed rail carrier, the Dakota, Minnesota & Eastern Railway Corporation, under the class exemption granted by the ICC in *Ex Parte 392*. Rail labor sought to bargain with the C&NW over the impact which that sale would have on approximately 170 employees who would be affected, but respondent C&NW asserted that the ICC's jurisdiction over that sale relieved it of any obligation towards its employees under the Railway Labor Act either to bargain over the impact of the sale on employees or to preserve the status quo pending that bargaining. Respondent's reliance on the ICC's jurisdiction to justify its refusal to bargain was sustained by the United States Court of Appeals for the

Eighth Circuit and has resulted in the petition which is presently pending before this Court in No. 87-2049.

While the Dakota, Minnesota & Eastern sale case was pending before the Eighth Circuit, respondent C&NW entered into an agreement with respondent FRVR Corporation to sell to that newly-formed subsidiary of Itel Rail Corporation[5] several shop facilities and approximately 208 miles of the C&NW between Green Bay and Milwaukee, Wisconsin [hereinafter, "Duck Creek South lines"]. Under that sale agreement, FRVR agreed to adopt "all existing rates, shipper agreements, transportation contracts and exempt quotations" (Verified Statement of L.F. Fox at 3), but it would not assume or become responsible for any C&NW collective bargaining agreement. Moreover, although respondent FRVR agreed to give a "right of first-hire" to C&NW employees who would be displaced by the sale, the new carrier has informed the C&NW employees that they will have to resign from the C&NW before they can become FRVR employees. Tr. at 104-05, 108.

Once rail labor learned of the possible sale of the Duck Creek South lines to respondent FRVR, the labor organizations began to serve notices on the C&NW under Section 6 of the Railway Labor Act, 45 U.S.C. § 156, to negotiate agreements to deal with the impact of that sale on the employees they represent.[6] These notices were

[5] Itel Rail Corporation directly or indirectly controls five other railroads, including one railroad which connects with the lines to be purchased from the C&NW. RLEA Brief in 7th Cir. No. 88-1504 at 8.

[6] When the C&NW asserted that the notices were barred by the moratorium provisions in the National Agreements which prohibited the service of Section 6 Notices on any subject closed by the National Agreements until April 1, 1988, petitioners served new Section 6 notices in February 1988 specifically tailored to this sale which had not been a subject of the national negotiations which lead to the National Agreements. Moreover, after the moratorium period expired on April 1, 1988, petitioners served

served because the sale would result in the elimination of around 300 jobs and the permanent loss of the job opportunities on the Duck Creek South lines. Moreover, rail labor asserted, the transfer of the work opportunities would change the seniority rights of employees whose seniority currently encompasses the Duck Creek South lines. For example, the yardmasters on the C&NW have a district form of seniority, as contrasted with system-wide seniority; this means that employees represented by the Railroad Yardmasters of America may use their seniority to bid for C&NW yardmaster positions in the territory covered by their seniority district, but not for yardmaster positions on other C&NW yardmaster seniority districts. Declaration of R.W. Olson. The Duck Creek South lines make up one yardmaster seniority district and the sale of those lines will eliminate that entire seniority district. *Id.* Also, the Duck Creek South lines are within the C&NW clerical employees' Seniority District No. 22, and the sale of those lines will eliminate approximately one-third of the jobs available to employees in that seniority district. Declaration of W.J. Van Kleek.

Rail labor proposed to deal with the impact of the sale on employees by negotiating agreements to provide both for the adjustment of the affected employees' seniority and for compensatory benefits to employees who may be placed in a worse position with respect to their compensation or working conditions as a result of that sale. *E.g.*, Short Appendix in 7th Cir. No. 88-1504 at Attachment F. Respondent C&NW responded to those notices by asserting that they were invalid for several reasons, including the C&NW's belief that the notices sought to usurp the authority of the ICC and concerned matters

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a third set of notices. Declaration of H.S. Gerth, dated August 30, 1988.

"reserved" to management's prerogatives.[7] Affidavit of R.J. Cuchna at 6-10. Respondent C&NW, however, stated that it was "agreeable to a meeting to discuss" rail labor's concerns. *Id.* at 6. Those discussions, though, were to be without prejudice to the C&NW's position that it did not have an obligation to bargain under the Railway Labor Act over the sale's impact on employees. Nevertheless, in early January 1988, respondent C&NW proposed to enter into an agreement offering a form of separation allowance to employees who may be affected by the sale and who were not able either to retain a position with the C&NW or to obtain employment with FRVR. Verified Statement of R. Schmiege at Appendix A, p.2; Supplemental Affidavit of R.J. Cuchna at § S-11. However, that proposal, respondent C&NW stated, was not to be considered as a Section 6 notice, was made without prejudice to its position that it had no obligation to bargain over the impact of the sale on employees, and would be made available to the employees even if rail labor did not enter into such an agreement. *Id.*

Rail labor and respondent C&NW met on several occasions to "discuss" rail labor's section 6 notices and respondent's proposal, but no agreement has been reached. *E.g.*, Gerth Declaration, *supra*, at 2. Those discussions are still being held. *Id.*

Shortly after several of the labor organizations served their first Section 6 notices on respondent C&NW, that carrier filed a complaint on January 19, 1988, with the United States District Court for the Northern District of Illinois seeking declaratory and injunctive relief. Respondent asked for a declaratory judgment declaring that the sale of the Duck Creek South lines, and matters per-

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[7] Respondent also asserted that the pre-April 1988 notices were barred by the Moratorium clauses in the National Agreements. *See*, note 6, *supra*. Although that objection was raised below, neither court ruled upon it, and in view of the April 1, 1988 deadline in the moratorium clauses, that objection is now moot.

taining to the protection of affected employees, were not proper subjects of bargaining because those matters were within the ICC's exclusive jurisdiction over rail line sales and were within "the sphere of C&NW managerial discretion . . . ." C&NW Complaint at 7. Respondent C&NW also sought a declaratory judgment that "any strike in connection with the Duck Creek South line sale, or labor protections in connection with that sale, would violate the Interstate Commerce Act and the Railway Labor Act . . . ." *Id.* at 8.[8] Petitioners counterclaimed seeking to enforce the Railway Labor Act's notice, bargaining and status quo obligations, and answered the C&NW's complaint by challenging both the court's jurisdiction to issue a strike injunction and the C&NW's standing under Section 8 of the Norris-LaGuardia Act, 29 U.S.C. § 108, to seek injunctive relief.[9]

In February 1988, respondent C&NW announced that it would sell the Duck Creek South lines in early March, and rail labor responded by threatening to strike if the sale occurred before an agreement was reached concerning the impact of the sale on employees. Respondents C&NW and FRVR then asked the district court to enjoin such a strike and on March 16, 1988, the district court granted respondents' request for a preliminary injunction because, the court concluded, petitioners were impermissibly threatening to strike over a "minor" dispute. Appendix B at 29a.

Respondent C&NW had asserted that the reduction in force provisions in its collective bargaining agreements with petitioners, which require the C&NW to give a cer-

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[8] Respondent also sought a declaration that the moratorium clauses barred the Section 6 notices.

[9] Respondents FRVR and ICC subsequently intervened in support of respondent C&NW.

tain number of days advance notice of job abolishments, *authorized* it to abolish the jobs when it sold the Duck Creek South lines. Consequently, the C&NW's argument continued, rail labor's challenge to its ability to sell and abolish jobs before agreements were reached presented nothing more than a dispute over its construction of its agreements and was, thus, subject to the exclusive jurisdiction of the adjustment boards established under Section 3 of the Railway Labor Act. Respondent further asserted that the past practice of abandoning lines and abolishing jobs without first bargaining under the Railway Labor Act supported its contention that this case actually involved a "minor dispute"—*i.e.*, a dispute within the exclusive jurisdiction of the adjustment boards. The district court accepted that argument because "the railroad's claims of contractual justification are not 'frivolous' or 'obviously insubstantial.'" Appendix B at 29a.[10]

Petitioners took an expedited appeal from the injunction order, but on August 23, 1988, the Seventh Circuit issued its decision affirming the grant of a strike injunction. According to the court of appeals, the collective bargaining agreements and the parties' past practices "embrace matters of job abolishment, layoff and reassignment . . . ." Appendix A at 14a. While the court noted that the C&NW's arguments that the "collective bargaining agreements contemplate abolishment of jobs without any of the severance-related benefits sought by the RLEA unions is based primarily, if not exclusively, on its claims as to the past practice or course of dealing under the

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[10] While the district court addressed the relationship between the Railway Labor Act and the Interstate Commerce Act, and the relationship of the Norris-LaGuardia Act to the Interstate Commerce Act, the validity of those rulings was not addressed by the court of appeals.

provisions of the agreements that pertain to job abolishment and layoff" (*id.*), that fact was not determinative because "nothing in the record" indicated that the past practice relied upon by the C&NW was "inconsistent with the express provisions of the agreements . . . ." *Id.* Although the court observed that the C&NW's interpretation of the agreements was "subject to challenge" (*id.*), the court concluded that (*id.* at 14a-15a): "Because C&NW's position has at least an arguable basis in the collective bargaining agreements and relevant past practice, it cannot be said to constitute the type of clear departure from those agreements necessary to trigger a finding of a § 6 major dispute under the RLA format."

Rail labor had argued that the nature of the impact of the sale on the employees' collective bargaining agreements, and the fact that rail labor was attempting to negotiate agreements to deal with the impact of that sale on employees, triggered the Railway Labor Act's major dispute resolution processes and required the district court to determine what "actual objective working conditions" must be maintained unchanged during the bargaining process. RLEA Brief in 7th Cir. No. 88-1504 at 28-46. Those arguments were rejected by the court of appeals because, the court stated, before the federal courts could order C&NW "to engage in negotiations under the § 6 RLA major dispute procedures . . . , we must conclude that there are no bona fide issues of contract interpretation presented here." Appendix A at 15a-16a n. 2. But, as the court added: "Given the nature and context of the current dispute between C&NW and the RLEA member unions, we are unable to reach that conclusion." *Id.*

This petition for a writ of certiorari has followed.

REASONS FOR GRANTING THE WRIT

There are currently three cases pending before this Court (*i.e.*, Sup. Ct. Nos. 88-217, 88-2049 and 87-1888) which involve a clear conflict among the courts of appeals as to whether the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, may be enforced in rail sale cases subject to regulation by the Interstate Commerce Commission under 49 U.S.C. § 10901. This case, petitioners respectfully submit, is inextricably entwined with those cases because this petition raises the question of exactly what Railway Labor Act rights are claimed to be overridden by the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.* The nature and extent of the Railway Labor Act rights at issue in these sale cases, for logical and practical reasons, must be determined before this Court considers whether the Interstate Commerce Act supersedes the Railway Labor Act in *Ex Parte 392* sale cases.

Besides being intertwined with the conflict of law issues, this case also presents issues which, on their own, warrant review by this Court because of their importance to the orderly administration of the Railway Labor Act. Federal Courts are the sole tribunal available to rail labor to enforce the labor statute's notice, bargaining and status quo commands, but because of an overly broad and, rail labor submits, erroneous test being applied by the lower courts to classify disputes as being either "major" or "minor," federal courts are improperly abdicating their jurisdiction to enforce the labor statute's major dispute commands, and are instead referring rail labor to adjustment boards which have no power to enforce those commands. Rail labor respectfully submits that the lower court's decision in this case is inconsistent with the decisions of this Court in *Detroit & Toledo Shore Line R.R. v. UTU*, 396 U.S. 142 (1969), and *Order of Railroad Telegraphers v. Chicago & North Western Ry.*, 362 U.S. 330 (1960), and conflicts with decisions by the Third, Fifth and Eighth Circuits on the same matter.

I. This Case Is Inextricably Entwined With Several Petitions Which Are Pending Before This Court Seeking Review Of The Conflict Among The Circuits Over Whether Federal Courts Have Jurisdiction To Enforce The Railway Labor Act In Cases Arising From The Sale Of Rail Lines

Rail labor has long considered the just and equitable treatment of rail employees affected by railroad restructurings to be an important concern, and for over half a century has sought to achieve suitable job security arrangements through both the collective bargaining and the political processes. *E.g., Order Of Railroad Telegraphers v. Chicago & North Western Ry., supra,* 362 U.S. at 336-38. Those efforts have been successful, for by 1980 rail employees had various job security arrangements, including both collectively bargained and government imposed arrangements, available to them if they were placed in a worse position with respect to compensation or working conditions as a result of different carrier actions ranging from technological changes to abandonments or carrier consolidations. *E.g.,* Mediation Agreement, Case No. A-7128, February 7, 1965; 49 U.S.C. §§ 10903(b)(2) and 11347. However, in 1982, that balance was suddenly changed when the ICC refused to impose protective arrangements to aid employees affected by sales of existing lines of railroad to newly-formed rail carriers.[12] *Knox & Kane R.R.—Exemption,* 366 I.C.C. 439 (1982).

That policy of no ICC-imposed protective conditions in sale cases became solidified in *Ex Parte 392,* and has led to rail labor's efforts to use the collective bargaining

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[12] Sales of rail lines to existing carriers are within the scope of 49 U.S.C. § 11343(a)(2) and are thus subject to mandatory employee protections. 49 U.S.C. § 11347. Sales to newly-formed railroads are viewed as being within the scope of 49 U.S.C. § 10901 which governs "acquisitions" and gives the ICC discretion to impose employee protections.

process to obtain by bargaining the protective arrangement which the ICC is no longer providing. Rail management, however, maintains that it is under no obligation to bargain with rail labor for a replacement form of protective arrangement and has resisted rail labor's bargaining efforts. That resistance has led to numerous law suits, which in turn have led to the petitions for writs of certiorari in three cases that present a conflict among the circuits as to whether federal courts are deprived of jurisdiction to enforce the Railway Labor Act in rail sale cases exempted from Interstate Commerce Act regulation by *Ex Parte 392*. Sup. Ct. No. 88-217, *ICC v. Pittsburgh & Lake Erie R.R.*; Sup. Ct. No. 87-2049, *RLEA v. Chicago & North Western Transportation Co.*; and Sup. Ct. No. 87-1888, *Pittsburgh & Lake Erie R.R. v. RLEA*.

Respondent C&NW is a respondent in No. 87-2049, which is the case brought by petitioner RLEA asking this Court to review the Eighth Circuit's decision of May 31, 1988. *RLEA v. Chicago & North Western*, 848 F.2d 102 (8th Cir. 1988). In that case, the Eighth Circuit concluded that the ICC's jurisdiction over rail line sales relieved respondent C&NW from all obligations under the Railway Labor Act to bargain with rail labor for a replacement employee protective arrangement, and to preserve the status quo during that bargaining. Respondent C&NW has agreed with RLEA that the petition in No. 87-2049 "presents issues of critical importance to the railroad industry, its employees, and the public interest" (C&NW Brief in No. 87-2049 at 6), and it has joined rail labor in asking this Court to grant the writ in that case. *Id.* at 13. Indeed, as RLEA pointed out in its petition in No. 87-2049, that case presents an ideal vehicle to resolve the conflict of laws presented by the carriers' and the ICC's reliance on the Interstate Commerce Act to justify a refusal to bargain and to preserve the status quo in rail sale cases.

This case, petitioners respectfully submit, is inseparable from the petition in No. 87-2049, for several reasons.

First, both cases involve the sale of rail lines by the C&NW where that carrier has relied upon *Ex Parte 392* as justification for its insistence that the ICC's jurisdiction over rail line sales has relieved it of all notice, bargaining and status quo obligations under the Railway Labor Act concerning those sales. And second, in both cases, respondent C&NW has urged the courts to reject rail labor's efforts to enforce the labor statute's major dispute resolution processes because, the C&NW has asserted, the reduction in force provisions of its collective bargaining agreements,[13] together with its past practice of abandoning lines without first bargaining, make the underlying dispute a minor dispute—*i.e.*, one subject to the jurisdiction of the adjustment boards.

This case, however, differs from that presented in No. 87-2049 in that the Seventh Circuit did not rely upon the Interstate Commerce Act to conclude that the federal courts lacked jurisdiction to consider rail labor's complaints to enforce the Railway Labor Act. In No. 87-2049, the Eighth Circuit accepted the C&NW's conflict of laws argument, whereas, in this case, the Seventh Circuit accepted the C&NW's minor dispute argument to conclude that the Railway Labor Act's notice, bargaining and status quo obligations were not applicable. Nevertheless, that difference between the two cases emphasizes the need for this Court to accept both cases for review.

All involved in the rail industry agree that this Court should resolve the controversy over the impact of *Ex Parte 392* on rail labor's ability to bargain meaningfully about the impact of rail sales on employees. But, petitioners respectfully submit, a decision on whether the transportation statute supersedes the major dispute prescriptions of the labor statute will not finally resolve the

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[13] Those provisions require the C&NW to give a certain number of days advance notice of job abolishments and, in some cases, provide procedures for recalls when new jobs are established.

controversy over rail labor's bargaining rights so long as some courts are holding that those rights are not implicated in such sales. In other words, rail labor submits, before this Court decides whether the ICC's jurisdiction over rail sales supersedes the Railway Labor Act obligations of rail carriers, this Court should first decide what Railway Labor Act obligations are actually triggered by these sales.

Respondent C&NW has recognized the conjunctive relationship of the issues presented both by this case and by No. 87-2049, for it argued before the district court in that sale case that RLEA's complaint should be dismissed because the reductions in force provisions and its past practice in abandonment cases made the dispute a minor dispute over which the court had no jurisdiction. It raised that same argument in the Eighth Circuit as an alternative basis to uphold the lower court's judgment, and it advanced that argument successfully before the lower courts in this case.

This minor dispute argument, however, is not confined to the C&NW, for reduction in force provisions are common clauses in rail collective bargaining agreements and virtually all Class I and II rail carriers have a past practice of abandoning rail lines without first bargaining under the Railway Labor Act. *E.g., Decker v. CSX Transportation, Inc.*, 688 F. Supp. 98 (W.D.N.Y. 1988), *appeal pending*, 2d Cir. No. 88-7461 (argued July 18, 1988). Indeed, rail carriers are relying upon their reduction in force provisions and related past practice to argue that any dispute over their ability to sell a rail line without first bargaining is a minor dispute subject to the exclusive jurisdiction of the adjustment boards. *E.g., Decker v. UTU, supra*; *Atchison, Topeka & Santa Fe Ry. v. RLEA*, N.D. Ill. Civil Action No. 87 C 9847. Consequently, unless the validity of that argument is considered along with the conflict of laws issues, the controversy over rail sales and their impact on employees will

not be resolved fully by this Court's decision in No. 87-2049.

II. This Case Presents Issues Which Are Important To The Orderly Administration Of The Railway Labor Act, But Which Have Not Been Decided By This Court

Disputes under the Railway Labor Act over rates of pay, rules or working conditions have long been divided into two categories—*i.e.*, "major" and "minor." *E.g.*, *Elgin, Joliet & Eastern Ry. v. Burley*, 325 U.S. 711, 722-23 (1945). While the Act itself does not employ those terms, the Act does contain a definition of the two classes of disputes in Section 2, 45 U.S.C. § 151a; the first class —*i.e.*, "major disputes"—are "all disputes concerning rates of pay, rules, or working conditions" (45 U.S.C. § 151a(4)), whereas the second class—*i.e.*, "minor disputes"—are "all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." 45 U.S.C. § 151a(5). In *Burley*, this Court gave a further definition to the two classes of disputes by referring to the understanding of the rail industry when the Railway Labor Act was amended in 1934 (Act of June 21, 1934, ch. 691, 48 Stat. 1185),[14] concluding that major dis-

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[14] George M. Harrison, the Chairman of RLEA in 1934, explained the two classes of disputes when he testified before a Senate committee on the 1934 Amendments:

> There are two classes of controversies that develop. One is what we call major changes, when we attempt to write a new contract or to revise a contract covering wages, rules, and working conditions.
>
> . . .
>
> . . . Now, the other class of controversy is the disputes that arise out of the application of that agreement to the practical situation on the railroad. . . . There are a thousand and one different kinds of controversies that can develop. Those are the controversies that will be settled by the national board. The

putes concerned changes to existing rates of pay, rules or working conditions for the future, whereas minor disputes contemplate the "existence of a collective agreement already concluded" and a claim "to rights accrued . . . ." 325 U.S. at 723.

This case, petitioners have argued, presents a dispute over changes to rates of pay, rules and working conditions for several reasons. First, the carrier's actions in selling the line would change, but not violate, the seniority rights of the employees because the sale will transfer the work opportunities around which those seniority rights have been negotiated. And second, rail labor recognized that the current agreements did not address the effects of *Ex Parte 392* sales, and has sought to negotiate agreements that do deal with these effects in a satisfactory manner. Respondent C&NW, however, asserted that since the current agreements provide the procedure which should be followed in abolishing jobs without any indication that the cause of the abolishment is relevant, its actions in affecting employees as a result of this sale are justified by the collective bargaining agreements; consequently, its argument continued, this dispute is actually one over the interpretation and application of those contractual provisions, and, thus, is within the exclusive jurisdiction of the adjustment boards.

Whether a dispute is considered to be major or minor is important because the Railway Labor Act provides diametrically different procedures to govern those disputes. Major disputes are subject to the Act's status quo obligation which prohibits either party to the dispute from changing "those actual, objective working conditions and practices, broadly conceived, which were in effect

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parties in the first instance have agreed on the contract; they have laid down rules.

Hearings on S. 3266 Before Senate Committee On Interstate Commerce, 73rd Cong., 2d Sess. at 33-34 (1934) (testimony of G.M. Harrison).

prior to the time the pending dispute arose and which are involved in or related to that dispute." *Detroit & Toledo Shore Line R.R. v. UTU*, 396 U.S. 142, 153 (1969). Minor disputes are not subject to that restriction, and thus a carrier may act on its interpretation of the agreements.

A second distinction between the two classes of disputes lies in the procedures adopted by the Act for their resolution. Major disputes are subject to the notice, bargaining and mediation provisions of the Act. Disputes still unresolved at the conclusion of those processes may be resolved by arbitration, but only if both sides agree. 45 U.S.C. § 157 First. If either party to the dispute refuses to arbitrate and the status quo period has expired (*see*, 45 U.S.C. § 160), the parties may use self-help to resolve the dispute. Minor disputes, on the other hand, are not subject to the Act's notice provision, but are required to be "conferenced"—*i.e.*, negotiated. 45 U.S.C. § 152 Sixth. If unresolved at the conclusion of the conferencing process, the dispute is to be resolved by the adjustment board process established by Section 3 of the Act, 45 U.S.C. § 153, if either party so requests. That process is a form of compulsory arbitration. *E.g.*, *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R.R.*, 353 U.S. 30 (1957).

Because of the different dispute resolution processes, and primarily because of the difference in the applicability of the Act's status quo requirement, whether a dispute is to be classified as being major or minor is extremely important to the orderly administration of the labor statute and to the rights given by that Act to rail labor. Indeed, the importance of the classification issue is well understood by both labor and management. *E.g.*, *Rutland Ry. v. Brotherhood of Locomotive Engineers*, 307 F.2d 21, 33 (2d Cir. 1962). This Court, however, except for defining the two classes of disputes in *Burley*, has not addressed the classification question directly, but rather,

has left the development of the manner in which those classifications should be made to the appellate courts.

Over the past four decades, the appellate courts have gradually developed the test which was enunciated by the Seventh Circuit in this case. Under that test, a federal court called upon to enforce the notice, bargaining or status quo commands of the Railway Labor Act should first determine whether the carrier asserts that the change in rates of pay, rules or working conditions is justified by its collective bargaining agreements, either written or implied from past practice. If a contract interpretation or application issue is presented, the dispute is to be classified as minor unless the claims of contractual justification are "frivolous" or "obviously insubstantial." Appendix A at 10a-11a. *Compare, IAM v. Soo Line R.R.*, 850 F.2d 368, 376-80 (8th Cir. 1988) *(en banc), with, Southern Ry. v. Brotherhood of Locomotive Firemen*, 384 F.2d 323, 327 (D.C. Cir. 1967). This essentially myopic test, rail labor submits, represents a substantial departure from the manner in which some appellate courts had approached the classification issue years ago. *See, Southern Ry. v. Brotherhood of Locomotive Firemen*, 337 F.2d 127 (D.C. Cir. 1964).

Because this Court has not given the appellate courts clear guidance on this issue, there is a lack of uniformity in the application of that standard. Moreover, some courts have failed to recognize that the classification of disputes as being major or minor cannot be determined by the application of a myopic standard which looks solely to whether a contract justification claim has been raised by the carrier. This uneven approach to rail labor disputes has resulted in comparable disputes being classified differently, *compare, RLEA v. Norfolk & Western Ry.*, 833 F.2d 700 (7th Cir. 1987), *with RLEA v. Consolidated Rail Corporation*, 845 F.2d 1187 (3d Cir. 1988), *pet. for cert. pending*, Sup. Ct. No. 88-1, and it has allowed the federal courts to abdicate their jurisdiction to

enforce the statutory commands of both the Railway Labor Act and the Norris-LaGuardia Act in favor of the jurisdiction of the adjustment boards which have no authority to interpret or to enforce those statutory rights. Indeed, some appellate courts, including the Seventh Circuit in this case, are applying a presumption that disputes are minor. Appendix A at 11a-12a (if there is any doubt as to classification, the "court will construe the dispute to be minor").

This expansion of the minor dispute classification so that it now encompasses most rail labor disputes is of grave concern to rail labor, for once the lower courts determine that a dispute is minor, they conclude that the federal courts lack jurisdiction over the controversy, including rail labor's request to enforce the Act's notice, bargaining and status quo obligations. Appendix A at 17a-18a. Also, following that classification, the courts will enjoin a carrier from changing the status quo only if such injunctive relief is necessary both to preserve the jurisdiction of the adjustment board and to prevent irreparable harm to the employees. *Id.* at 20a. In practice, such injunctive relief is rarely given.

Rail labor respectfully submits that the compulsory nature of the adjustment board procedures were never intended to be applicable to "disputes concerning *changes* in rates of pay, rules, or working conditions;" rather, those compulsory resolution processes were intended to apply to "only the minor cases growing out of the grievances or out of the interpretation or application of agreements." *Hearings on S. 3266 Before Senate Committee On Interstate Commerce, supra* note 13 at 17 (testimony of Joseph B. Eastman) (emphasis added). Moreover, rail labor submits, the sponsors of the 1934 amendments did not view that legislation as outlawing strikes over changes in working conditions, even if combined with an interpretation issue; the validity of this assertion may be seen from Commissioner Eastman's response to the ques-

tion of whether the legislation his office had drafted was intended to prohibit rail labor from striking over unfavorable adjustment board awards; as Commissioner Eastman replied:

> I may say, so far as I am concerned, it had not seemed to me that matter was a contingency of importance, because I cannot conceive of organizations striking over the settlement of grievances, particularly when they had been passed upon by an impartial tribunal under Government auspices.
>
> It is a serious enough thing to strike when a major matter is involved; but when you have only minor grievances and they have had full opportunity to be heard and have had their day in court before a tribunal, it hardly seemed to be that that was a question that was likely to arise. . . .

Hearings on H.R. 7650 Before House Committee On Interstate And Foreign Commerce, 73rd Cong. 2d Sess. at 63-64 (1934) (testimony of Joseph B. Eastman).

Besides being contrary to the intent of the sponsors of the 1934 legislation, the expansive, undiscerning test used by the appellate court in this case to encompass a dispute over *changes* in rates of pay, rules or working conditions, ignores the commands of Section 2 Seventh of the Railway Labor Act, which also trace their genesis to the 1930's rail legislation.[15] Section 2 Seventh provides that: "No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this

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[15] The commands of that section were first included as Section 77(o) of the Bankruptcy Act amendments in 1933, Pub. L. No. 420, 72nd Cong., 2d Sess., 47 Stat. 1467, 1481, and then made applicable to all railroads by Section 7(e) of the Emergency Railroad Transportation Act of 1933, ch. 91, 48 Stat. 211, 214. They were then added to the Railway Labor Act by the 1934 amendments and have not been changed since.

Act." 45 U.S.C. § 152 Seventh. Federal courts clearly have jurisdiction to enforce the commands of that statutory provision (*e.g., Brotherhood of Railway Clerks v. Florida East Coast Ry.*, 384 U.S. 238 (1966)), and thus a question is presented as to whether the federal courts, when ruling on a suit to enforce Section 2 Seventh, are precluded by the adjustment boards' jurisdiction over contract interpretation issues from determining whether the carrier is *changing* rates of pay, rules or working conditions, or whether that change is being accomplished in the manner "prescribed in such agreements . . . ." This Court touched upon this issue in *Order of Railroad Conductors v. Pitney*, 326 U.S. 561 (1946), but did not address the question of the scope of federal court jurisdiction over Section 2 Seventh.

Moreover, since this case involves the carrier's request to the federal courts for an injunction in a labor dispute, the limitations of the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.*, upon the jurisdiction of the federal courts must be considered. *Pitney* did not deal with the strictures of the Norris-LaGuardia Act, Section 8 of which expressly deprives a complainant of standing to obtain an injunction if that complainant "has failed to comply with any obligation imposed by law which is involved in the labor dispute in question . . . ." 29 U.S.C. § 108. In this case, respondent C&NW was granted an injunction even though rail labor maintained that the carrier had violated its obligations under Sections 2 First, 2 Seventh and 6 of the Railway Labor Act to give notice and to bargain over the impact of the sale on employees, and to maintain the status quo until that bargaining was completed. Federal courts clearly have jurisdiction to examine that standing challenge, but in this case that challenge was rejected solely because the C&NW had presented a non-frivolous, albeit questionable, assertion that its reduction in force contractual provisions authorized the job abolishments which will occur once it sells the Duck Creek South lines.

Petitioners respectfully submit that this Court should examine the relationship between the federal courts' jurisdiction under Section 2 Seventh and 6 to classify disputes, and the jurisdiction of adjustment boards under Section 3 of the Act to interpret collective bargaining agreements. In view of the manner in which the lower courts have expanded the minor dispute classification far beyond the intent of the 1934 amendments, so as to virtually repeal Section 2 Seventh, a review by this Court of that relationship is now urgently needed.

III. This Case Presents Important Questions Of Law Which Have Been Decided By The Seventh Circuit In A Manner Which Is Inconsistent With Decisions By This Court On Related Matters, And Conflicts With Decisions By Other Courts Of Appeals On The Same Subject

Although this Court has not decided the precise questions presented by this petition, it has decided several cases which establish that the classification standard applied by the court of appeals in this case is an inappropriate standard to determine whether federal courts have jurisdiction to enforce the Railway Labor Act's major dispute resolution procedures. Moreover, several courts of appeals have addressed the same proposed changes and bargaining requests which are involved here and have concluded, in direct conflict with the Seventh Circuit's decision, that the Act's major dispute processes had been triggered. Even though the Seventh Circuit attempted to distinguish two of those conflicting appellate court cases, the decisions are irreconcilable. Because of this conflict over an important question of law, and in view of the manner in which the appellate court's decision in this case deviates from prior decisions by this Court, petitioners submit, this Court should accept this case for review.

In *Order of Railroad Telegraphers v. Chicago & North Western Ry., supra*, this Court addressed whether a rail union had a right to bargain over a railroad's decision

to close several stations and to consolidate the work of employees represented by that union. *See, First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 686 n.23 (1981). That factual situation is comparable to this case, for here the C&NW plans to take an action which will have the effect of eliminating work opportunities and employees' seniority rights. Moreover, in *Telegraphers*, as is true in this case, the union served its own notice upon the carrier under Section 6 of the Railway Labor Act to bargain for an arrangement which the union believed would adequately protect its members. As occurred here, the carrier in *Telegraphers* asserted that the Railway Labor Act's major dispute procedures had not been triggered because, among other reasons, the union's Section 6 notice was barred by the contract moratorium clause (*see*, note 6, *supra*), and the dispute was thus a minor dispute. This Court rejected that argument by stating (362 U.S. at 341):

> Only a word need be said about the railroad's contention that the dispute here with the union was a minor one relating to an interpretation of its contract and therefore one that the Railway Labor Act requires to be heard by the National Railroad Adjustment Board. . . . [I]t is impossible to classify as a minor dispute this dispute relating to a major change, affecting jobs, in an existing collective bargaining agreement, rather than to mere infractions or interpretations of the provisions of that agreement.

While the C&NW's predecessor did not argue in that case that the reduction in force provisions of its collective bargaining agreements with the Telegraphers authorized it to abolish jobs, and thus presented a contract justification for its actions, the rationale of this Court's decision that the case presented a major dispute is clearly inconsistent with the major-minor classification standard applied by the court of appeals in this case. In *Telegraphers*, the carrier had presented a contract justifica-

tion for its refusal to bargain over the union's Section 6 notice and that justification was not frivolous or obviously insubstantial. *See*, Sup. Ct. No. 100, 1959 Term, Brief for Respondent at 20-21. Nevertheless, this Court looked to the nature of the dispute, which concerned proposed *changes* to existing working conditions, to determine whether that dispute was subject to bargaining and mediation, or to the adjustment board processes.

This Court's implicit rejection of the appellate courts' classification standard is further evident when this case is viewed in the light cast by *Detroit & Toledo Shore Line R.R. v. UTU, supra.* In *Detroit & Toledo*, this Court explicitly rejected the carrier's assertion that the status quo, which the Railway Labor Act required be maintained during the major dispute resolution processes, consisted solely of those working conditions established in the written contracts. 396 U.S. at 153-55. Rather, this Court concluded that the status quo obligation of the Act required the carrier to preserve unchanged more than contractually established working conditions. As the Court held, the carrier was required "to preserve and maintain unchanged those actual, objective working conditions and practices, *broadly conceived*, which were in effect prior to the time the pending dispute arose and which are involved in or related to that dispute." 396 U.S. at 153 (emphasis added). Finally, *Detroit & Toledo* establishes the jurisdiction of the federal courts to determine what actual objective working conditions make up the status quo. *See, Air Cargo, Inc. v. Local 851, IBT*, 733 F.2d 241, 246-47 (2d Cir. 1984).

When this case is examined in light of *Detroit & Toledo* and with a recognition that rail labor has been seeking in this case to bargain for an agreement to deal with the effects of the sale on its members, respondent C&NW's contract justification argument is actually a claim that the status quo includes its contractual right to affect employees in the manner set forth in the reduction in force provisions of its collective bargaining agree-

ments. Since rail labor, the C&NW's argument continues, disputes that interpretation of its contractual right to act in this manner during the status quo period, this case presents only a minor dispute. The court of appeals agreed with that classification, because it could not conclude that the C&NW's interpretation of the contractual rights which were to be preserved during the status quo period, was frivolous or obviously insubstantial.

Petitioners respectfully submit that the application of the major-minor classification standard to determine whether federal courts have jurisdiction over a dispute concerning what working conditions constitute the status quo, is entirely inconsistent with *Detroit & Toledo.* As Justice Marshall explained in his dissent in *Rutland Ry. v. BLE, supra,* 307 F.2d at 44-46, when he was a Circuit Judge, the application of a major-minor classification standard is "entirely erroneous once . . . a [Section 6] notice has been served." 307 F.2d at 46. This is so because as this Court subsequently held in *Detroit & Toledo,* the status quo "freezes" the working conditions as actually applied, and not as a carrier may subsequently assert are arguably included in its contracts. *See, Rutland Ry. v. BLE, supra,* 307 F.2d at 44-45 n.11; *Southern Ry. v. Brotherhood of Locomotive Firemen, supra,* 337 F.2d at 132-33. Moreover, *Detroit & Toledo* shows that the district court has the responsibility to determine what working conditions constitute the status quo, but, as occurred here, an application of the major-minor classification standard improperly abdicated that responsibility to the adjustment boards which are without authority to execute it. Petitioners respectfully submit that the relationship between *Detroit & Toledo* and the contractual status quo defense raised in this case presents an issue which by itself warrants the granting of this petition.

Finally, the appellate court's application of a myopic dispute classification test to this case is in direct conflict

with the decisions of the Third, Fifth and Eighth Circuits in *RLEA v. Pittsburgh & Lake Erie R.R.*, 845 F.2d 420 (3rd Cir. 1988), *pet. for cert. pending*, Sup. Ct. No. 87-1888; *United Industrial Workers v. Board of Trustees*, 351 F.2d 183 (5th Cir. 1965); and *Burlington Northern R.R. v. UTU*, 848 F.2d 856 (8th Cir. 1988), *pet. for rehearing pending*. In each of those cases the appellate court was faced with a carrier action contemplating the transfer of job opportunities to a new operator, and in each case the court concluded that the Act's major dispute resolution procedures were applicable.

In the Fifth Circuit case, the court specifically rejected the carrier's claim that the dispute was minor since, the carrier claimed, the job abolishments which occurred when its elevator operations were transferred to a lessee, were justified by the reduction in force provisions in its agreement. 351 F.2d at 187-89. In that case, the court specifically concluded that the dispute should not be viewed through the "major or minor lenses," but rather, had to be viewed realistically. 351 F.2d at 189.

Although the railroad in the Third Circuit case did not raise the minor dispute defense, it raised the argument which is actually being advanced by the C&NW here; namely, that the status quo included its right to sell. That argument was rejected by the Third Circuit. 845 F.2d at 431-32. The railroad in the Eighth Circuit case raised a status quo argument which was identical to the assertion advanced in this case by the C&NW, but, the Eighth Circuit did not view that defense as changing the essential character of the dispute. Indeed, in both cases, the courts concluded that the carriers' decisions to sell, and the impact which those decisions would have on employees, triggered the Railway Labor Act's notice and bargaining obligations. 845 F.2d at 428-30; 848 F.2d at 864 n.9.

In all three cases, the appellate courts recognized that the actions proposed by the carriers would change the

working conditions of the employees who would be affected by those actions, and that the parties had not previously included those specific carrier actions (*i.e.*, transfer of existing work opportunities) in their contracts. That approach to whether the Act's notice, bargaining and status quo obligations are implicated in rail labor's dispute with a carrier stands in sharp contrast to the one employed by the Seventh Circuit in this case. Here, the Court looked solely to the carrier's contention that its agreements dealt with job abolishments, and since that was how employees would be affected, the dispute, the court concluded, was one subject to resolution by the adjustment boards. That approach to federal court jurisdiction totally frustrates the Act's prohibition against changes in "rates of pay, rules, or working conditions of its employees, . . . except in the manner prescribed . . . in section 6," with which rail labor has attempted to comply in this case. But more important to this petition, the fact that the court of appeals had available to it a standard developed by the appellate courts which could be utilized to neutralize or avoid the notice, negotiations and status quo requirements of the Act in a dispute of the magnitude depicted by the circumstances of this case, demonstrates the necessity of this Court's examination of that standard to determine the extent to which federal courts have jurisdiction to enforce the Railway Labor Act.

CONCLUSION

For the reasons set forth herein, petitioners respectfully request that this Court grant the writ.

Respectfully submitted,

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Date: September 16, 1988

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APPENDICES

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 88-1504

CHICAGO AND NORTH WESTERN TRANSPORTATION CO.,
FRVR CORPORATION, and
INTERSTATE COMMERCE COMMISSION,
Plaintiffs-Appellees,

v.

RAILWAY LABOR EXECUTIVES ASSOCIATION, *et al.*,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 88-C-444—Paul E. Plunkett, *Judge*

ARGUED APRIL 21, 1988—DECIDED AUGUST 23, 1988

Before WOOD, JR. and KANNE, *Circuit Judges*, and ESCHBACH, *Senior Circuit Judge.*

ESCHBACH, *Senior Circuit Judge.* Appellant Railway Labor Executives Association ("RLEA") appeals from the district court's order granting a preliminary injunction to appellee Chicago & North Western Transportation Company ("C&NW") barring a strike by RLEA's

constituent unions and denying RLEA's motion for a preliminary injunction barring the sale of C&NW's Duck Creek South line. We have jurisdiction over this matter pursuant to 28 U.S.C. § 1292(a)(1).

I

C&NW is a Class I rail carrier with operations in ten midwestern states. At present C&NW has approximately 9,000 employees. It is a party to eleven collective bargaining agreements with some fourteen unions representing its employees. Those unions are represented in this action by the RLEA. In the past twenty years C&NW has substantially reduced the size of its rail system by abandoning or selling unprofitable segments of track. Since 1981, its work force has been significantly reduced, including the elimination of a large number of craft jobs covered by the eleven collective bargaining agreements.

In 1987 C&NW decided to sell a portion of its system known as the Duck Creek South line to FRVR Corporation ("FRVR"). FRVR is a new corporation and is not a Class I rail carrier. That fact and the "short line" nature of the Duck Creek South line, brought the proposed sale within the reach of the expedited procedure for securing prompt Interstate Commerce Commission ("ICC") approval of certain regional and short-line railroad sales articulated in the Commission's decision in *Ex Parte No. 392*, 1 ICC2d 810 (1985), *aff'd sub nom. Illinois Commerce Comm'n v. ICC*, 817 F.2d 145 (D.C. Cir. 1987).[1] The proposed sale would result in the abolish-

[1] It is not necessary for the purposes of our analysis to fully recapitulate the course of events that lead the ICC to formulate the policy set forth in *Ex Parte No. 392*. It is sufficient to note that the new policy has its genesis in the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, and to briefly explain its primary features. The Staggers Act authorized the ICC to exempt from regulation a broad range of rail-related transactions deemed to be of limited scope. 49 U.S.C. § 10505(a). Acting pursuant to that statutory authorization, the Commission has developed a policy where-

ment of more than 300 craft jobs on the C&NW. The majority of the craft employees whose jobs on the Duck Creek South line would be eliminated (some 200) would be hired by FRVR. C&NW anticipates that the balance of the affected employees will be able to find positions in the remainder of its system.

On December 23, 1987 C&NW and FRVR filed a Verified Notice of Exemption and Petition for Clarification with the ICC with regard to the Duck Creek South line sale. Under the procedures established in *Ex Parte No. 392*, the Commission's authorization of the sale became effective on December 30, 1987. In December 1987 C&NW had informed the RLEA-represented unions of its intention to sell the Duck Creek South line. It did not serve notice on the unions under § 6 of the Railway Labor Act ("RLA" or the "Act"), 45 U.S.C. § 156, of an intent to change rates of pay, rules or working conditions. However, it did make one or more proposals to the unions pertaining to the payment of separation allowances to employees whose employment with C&NW would be terminated by the sale.

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by a short-line rail sale to a non-carrier (like FRVR) is automatically approved within seven days of the filing of an application with the ICC for exemption from regulation under the Interstate Commerce Act, unless the Commission disapproves the application for exemption. 49 CFR 1150.32(b). In *Ex Parte No. 392* the ICC announced its intention to exempt "substantially all" sales of rail lines to non-carriers from regulation under § 10901 procedures. 1 ICC2d at 816. One of the key ramifications of the ICC's new policy with regard to the approval of regional and short-line sales is the fact that the Commission no longer routinely imposes "labor protective conditions" on such sales. *Id.* at 815. These labor protective conditions, formerly imposed by the ICC as a routine part of its approval of a rail line sale, resulted in substantial pay and benefits protections being extended to the employees whose jobs were affected by such sales. In large part, the present dispute between C&NW and the RLEA member unions arises from the unions' efforts to negotiate pay, economic and other benefits to replace the protections formerly imposed by the ICC.

Upon learning of the planned sale of the Duck Creek South line, as early as October 1987, the several unions filed § 6 notices with C&NW seeking to negotiate an agreement covering the employees whose jobs would be affected. In February 1988 the unions served new § 6 notices on C&NW expressing their desire to negotiate severance notice requirements and wage, benefit and seniority protections for the craft employees who would be displaced by the sale of the Duck Creek South line. C&NW has refused to enter into negotiations with the unions under the RLA § 6 procedures.

On January 19, 1988 C&NW filed the present action under 28 U.S.C. § 2201 seeking a declaratory judgment that the proposed sale of the Duck Creek South line to FRVR and any labor protective provisions that might accompany it are subject to the exclusive jurisdiction of the ICC and therefore are not a proper subject of bargaining under the Railway Labor Act, 45 U.S.C. §§ 151-188 (1948). On February 22, 1988, FRVR's motion to intervene as a plaintiff was granted by the district court. On March 3, 1988, the ICC's motion to intervene as a plaintiff was granted.

Sometime in February 1988, C&NW informed the unions that the Duck Creek South line sale would be consummated on March 4, 1988. In response, the unions informed C&NW of their intent to strike if the sale went through without either an agreement being reached on the notice and other rights that would be afforded the employees displaced by the sale, or alternatively, an exhaustion of the RLA § 6 procedures. In response, on February 24, 1988, C&NW filed in the district court a motion for a temporary restraining order and a preliminary injunction to prevent the unions from striking. RLEA filed cross-motions to enjoin the sale and in opposition to the temporary restraining order and preliminary injunction sought by C&NW. Pending resolution of this

matter by the district court, C&NW agreed not to complete the Duck Creek South line sale and the unions agreed not to strike.

C&NW's motion and RLEA's cross-motion came before the district court for hearing on March 16, 1988. At the close of that hearing the district court announced its decision. The court refused to enjoin the Duck Creek South line sale, holding that it was without jurisdiction to do so because RLEA's effort to procure that injunction constituted an impermissible collateral attack on an ICC order. In so holding, the district court expressed its disagreement with the decision to the opposite effect of the U.S. Court of Appeals for the Third Circuit in *RLEA v. Pittsburgh & Lake Erie Railroad Co.*, 845 F.2d 420, 437-39 (3d Cir. 1988) (holding, *inter alia*, that an effort by RLEA to obtain an injunction to prohibit a railroad from selling its rail assets pending bargaining over the effects of the sale on employees under the § 6 dispute resolution procedures of the RLA did not constitute an impermissible collateral attack on the ICC's decision to permit the sale under its *Ex Parte No. 392* procedure).

The district court granted C&NW's motion for a preliminary injunction against the threatened strike. The district court based this second holding on its interpretation of the RLA. Applying and interpreting relevant precedent from our Circuit, the district court determined the dispute between the RLEA and C&NW to be a "minor dispute" under the RLA dispute resolution framework and therefore subject to the exclusive jurisdiction of the National Railroad Adjustment Board ("NRAB"). Finally, the district court refused to condition the preliminary injunction barring any strikes on a delay in the Duck Creek South line sale.

The district court ordered C&NW and the RLEA to proceed with the resolution of their dispute before the NRAB pursuant to the § 3 RLA procedures. 45 U.S.C.

§ 153. On March 24, 1988 our Court agreed to hear the RLEA's appeal on an expedited basis. C&NW and FRVR agreed to delay consummation of the Duck Creek South line sale pending the decision of the present appeal.

II

On this appeal we are asked to review the decision of the district court to grant a preliminary injunction barring a threatened strike by the several craft unions represented by the RLEA and the district court's concomitant decision to deny RLEA's request that it enjoin the Duck Creek South line sale. The district court's decision and the contentions of the parties focus upon the effect in this dispute of the RLA and the provisions of the Interstate Commerce Act pertaining to railroad carriers, 49 U.S.C. §§ 1-300. Our review of the district court's determinations of these questions of law is *de novo*. *Curtis v. Thompson*, 840 F.2d 1291, 1296 (7th Cir. 1988). *See also United States v. L'Allier*, 838 F.2d 234, 240 (7th Cir. 1988) (holding that a district court's determination of a question of law is reviewed *de novo*). We will address first the issues pertaining to the Railway Labor Act.

III

A. The Relevant RLA Case Law

The Railway Labor Act was enacted by Congress to promote stability in labor-management relations in the railroad industry by providing, *inter alia*, procedures designed to facilitate the orderly and peaceful resolution of labor-management disputes. *Brotherhood of Railroad Signalmen v. Burlington Northern Railroad Co.*, 829 F.2d 617, 619 (7th Cir. 1987) (citing *Leu v. Norfolk & Western Railway*, 820 F.2d 825, 827 (7th Cir. 1987)). Labor-management disputes that arise under the RLA are classified either as "major disputes" or "minor disputes." The "major dispute"/"minor dispute" distinction is essential

in that it determines which of the two RLA labor-management dispute resolution procedures a rail carrier employer and its unions must follow when a disagreement arises as to matters affecting employees represented by those unions. *Railway Labor Executives Association v. Norfolk & Wetern Railway Co.*, 833 F.2d 700, 703-04 (7th Cir. 1987).

> If a dispute is major, the parties must attempt to resolve it through negotiation, mediation [by the National Mediation Board] and possible presidential intervention [as contemplated by the procedures set forth in 45 U.S.C. §§ 154-160]. If a major dispute cannot be resolved, the union can strike in support of its position. If a dispute is minor, the parties first must attempt to resolve their dispute through negotiation. If negotiation fails, however, the parties must submit their minor dispute to the National Railway Adjustment Board for resolution. The NRAB's jurisdiction over minor disputes is exclusive. A minor dispute cannot be the subject of a strike.

Id. at 704 (citations omitted).

The terms "major dispute" and "minor dispute" are nowhere defined in the RLA. Rather, as our Court has previously observed, the "terminology is drawn from judicial gloss on the statute" that finds its origin in the U.S. Supreme Court's decision in *Elgin, Joliet & Eastern Railway v. Burley*, 325 U.S. 711, 722-27, 65 S. Ct. 1282, 1289-91 (1945). *National Railway Labor Conference v. International Association of Machinists and Aerospace Workers*, 830 F.2d 741, 746 (7th Cir. 1987).

The distinction between major disputes and minor disputes is an imprecise one. *RLEA*, 833 F.2d at 703. Nevertheless, it is clear that the primary point of reference in drawing this bifurcation is the collective bargaining agreement between the rail carrier and the involved

union(s). *Chicago & North Western Transportation Co. v. International Brotherhood of Electrical Workers, Local Union No. 214*, 829 F.2d 1424, 1427 (7th Cir. 1987). Thus, in *Burley, supra*, the Supreme Court defined major disputes and minor disputes in the following manner.

> [The term major dispute] relates to disputes over the formation of collective bargaining agreements or efforts to secure them. They arise when there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of legal rights for the future, not to assertion of rights claimed to have vested in the past.
>
> [The term minor dispute] contemplates the existence of a collective bargaining agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal charge in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or an omitted case. In the latter event the claim is founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement, *e.g.* claims on account of personal injuries. In either case the claim is to rights accrued, not merely to have new ones created for the future.

325 U.S. at 723, 65 S. Ct. at 1290.

Our Court has characterized the difference in the two types of RLA labor disputes in several different ways. A major dispute has been variously described as one "over the formation or alteration of [a] collective bargaining agreement[]," *Machinists*, 830 F.2d at 746, or as an "attempt to create a contract or change the terms of a contract," *IBEW*, 829 F.2d at 1427. *Accord Brotherhood of*

Locomotive Engineers v. Boston & Maine Corp., 788 F.2d 794, 797 (1st Cir.), *cert. denied*, —— U.S. ——, 107 S. Ct. 111 (1986). Consistent with the approach we have taken is the view of the Eighth Circuit which places within the major dispute category a proposed action by a rail carrier that "is a clear departure from the collective bargaining agreement." *Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington Northern Railroad Co.*, 802 F.2d 1016, 1017 (8th Cir. 1986).

An examination of our Circuit's earlier decisions disclose the following characterizations of minor disputes under the RLA. "A minor dispute is a dispute over the interpretation of an existing contract." *IBEW*, 829 F.2d at 1427. "Minor disputes do not involve fundamental changes in labor-management relations but rather focus on whether a change is arguably comprehended within an already existing collective bargaining agreement." *Burlington Northern*, 829 F.2d at 619. Our cases make one thing clear. In order to ascertain if a dispute between a rail carrier and the union(s) representing its employees is major or minor, we "must determine whether the dispute can be resolved by reference to an existing collective bargaining agreement." *RLEA*, 833 F.2d at 704.

If the dispute can be resolved by reference to the parties' collective bargaining agreement, *i.e.*, if it is "arguably comprehended within an already existing collective bargaining agreement," it is a minor dispute. *Burlington Northern*, 829 F.2d at 619. In ascertaining whether a rail carrier's disputed actions are justified by or fall within the parameters of an existing collective bargaining agreement, the courts are permitted to look to the "settled past practices of the parties" under that agreement. *See Brotherhood of Maintenance of Way Employees*, 802 F.2d at 1017. *See also Machinists*, 830 F.2d at 747 ("Collective bargaining agreements in the railroad industry

are, of course, contracts, and the custom and usage in the trade or the past course of dealing among the parties may well be relevant to a determination of any ambiguity in the contractual language."). "Within the railroad industry in particular, it is common practice to omit from written agreements non-essential practices that are acceptable to both parties." *RLEA*, 833 F.2d at 705.

Thus, in determining the range of employer actions that can arguably be said to fall within the scope of a collective bargaining agreement, we may properly consider both the agreement's express terms and "any well established practices that constitute a 'course of dealing' between the carrier and employees." *RLEA*, 833 F.2d at 705 (footnote omitted) (quoting *Detroit and Toledo Shore Line Railroad v. United Transportation Union*, 396 U.S. 142, 154, 90 S. Ct. 294, 301 (1969)). Our Court has acknowledged that an established past practice cannot be used to contradict the express language of a collective bargaining agreement in an effort to transmute a major dispute into a minor dispute. *RLEA*, 833 F.2d at 705, n. 4 (citing *Brotherhood of Railway Carmen v. Norfolk & Western Railway*, 745 F.2d 370, 376-78 (6th Cir. 1984). *See also Machinists*, 830 F.2d at 747 ("arguments from past practice may be relevant to the characterization of a dispute as major or minor, but it is also true that they most often have only a limited impact on the characterization") (footnote omitted).

In deciding whether a dispute can be resolved by reference to the existing collective bargaining agreement(s) and relevant established past practice, "[t]he court does not consider the merits of the underlying dispute; its role is limited to determining whether the dispute can be characterized as involving the proper application or meaning of a contract provision." *RLEA*, 833 F.2d at 704. *See also Maine Central Railroad Co. v. United Transportation Union*, 787 F.2d 780, 782 (1st Cir.), *cert. denied*, —— U.S. ——, 107 S. Ct. 169 (1986) (holding that where a

rail carrier has presented evidence that arguably supports its claim of a contractually-based past practice covering a matter in dispute "the court's inquiry must end; it is not for it to weigh, and decide who has the better of the argument"). "Where the parties disagree over whether the dispute can be resolved by reference to an agreement the dispute is minor unless the claims of contractual justification are 'frivolous' or 'obviously insubstantial.'" *Machinists*, 830 F.2d at 746 (quoting *Atchison, Topeka and Santa Fe Railway v. United Transportation Union*, 734 F.2d 317, 321 (7th Cir. 1984)). *See also RLEA*, 833 F.2d at 704; *Burlington Northern*, 829 F.2d at 619.

It is clear that the primary factor underlying this predisposition, in close cases, in favor of a "minor dispute" finding is the concern for minimizing the ocurrence of strikes in the rail transportation industry. *See Brotherhood of Locomotive Engineers v. Atchison, Topeka and Santa Fe Railway Co.*, 768 F.2d 914, 920 (7th Cir. 1985). Rail unions are not permitted to strike over minor disputes. *Burlington Northern*, 829 F.2d at 619 (citing *Brotherhood of Railroad Trainmen v. Chicago River & Indian Railway Co.*, 353 U.S. 30, 77 S. Ct. 635 (1957)). *See also RELA*, 833 F.2d at 704 ("A minor dispute cannot be the subject of a strike.").

> The primary objectives of the RLA are to promote stability in labor relations in the railroad industry and prevent strikes. Because a major dispute can escalate into a strike, if there is any doubt as to whether a dispute is major or minor a court will construe the dispute to be minor.

RLEA, 833 F.2d at 705 (citing *Detroit and Toledo*, 396 U.S. at 154, 90 S. Ct. at 301; *Leu*, 820 F.2d at 827; and *Atchison*, 768 F.2d at 920). In addition, we have cited the "need to protect the [NRAB's] exclusive jurisdiction over minor disputes" as another reason for the corollary that "'when in doubt, the court construes disputes as

minor.'" *Machinists*, 830 F.2d at 746 (quoting *Atchinson*, 768 F.2d at 920).

B. The Major Dispute-Minor Dispute Determination

Our review of the district court's determination that the present dispute between C&NW and RLEA is a minor dispute under the RLA scheme is guided by the preceding summary of the extensive relevant precedent in our Circuit. Because C&NW claims that its controversy with RLEA arising from the proposed sale is a minor dispute, it can properly be assigned the burden of proving that assertion. The preceding analysis demonstrates that the employer's burden is "relatively light". *Burlington Northern*, 829 F.2d at 619. *See also Brotherhood of Maintenance of Way Employees*, 802 F.2d at 1022.

RLEA attempts to frame this dispute as one pertaining to the changed pay, seniority status and working conditions that will be encountered by the current C&NW employees whose employment rights will be affected by the proposed sale of the Duck Creek South line. RLEA insists that C&NW does not have a right under the collective bargaining agreements to abolish jobs within the context of a rail line sale and concurrently refuse to negotiate over the effects of that sale on its present employees. The RLEA constituent unions have served § 6 notices on C&NW seeking changes in the current collective bargaining agreements pertaining to the pre-sale/job abolishment and post-sale/job abolishment status of the employees who will be affected by the proposed sale. Given that fact, and because no provision of the current agreements expressly grants C&NW the right to sell a rail line and abolish jobs without negotiating over the effects of that sale, RLEA insists that C&NW cannot be permitted to claim that this controversy is one that can be resolved based on the existing collective bargaining agreements.

C&NW first notes two aspects of RLEA's position which it believes to be of significance. RLEA does not challenge C&NW's right under the collective bargaining agreements to abolish jobs once the work assigned to those positions is no longer available. Second, RLEA concedes that the present contractual provisions, unless changed, will continue to govern the employment-related rights of the current C&NW employees who will be affected by the Duck Creek South line sale. In its own substantive argument, C&NW contends that the job abolishment, layoff and reassignment actions it will take as a result of the Duck Creek South line sale are fully authorized by the collective bargaining agreements. C&NW insists further that it has for some twenty years taken similar actions (*i.e.*, discontinuing operations on certain portions of track and concurrently abolishing jobs and laying off and reassigning employees) without objection from the RLEA unions (with one recent exception) and without a demand from the unions that the § 6 RLA procedures be initiated.

We are not concerned with the relative merits of the parties' arguments as to whether the actions C&NW would take with regard to the employees affected by the Duck Creek South line would violate or are sanctioned by the current collective bargaining agreements between C&NW and the RLEA unions. *See RLEA*, 833 F.2d at 705; *Maine Central Railroad*, 787 F.2d at 782. Ascertaining the actual validity of C&NW's claims of contractual justification is a task falling outside the limited role of the federal courts in rail carrier-union disputes arising under the RLA. Rather, our charge is to determine if the subject matter of the parties' dispute is "arguably comprehended" within, and potentially amenable to resolution by reference to, their existing collective bargaining agreements and the attendant established past practices not in conflict with the terms of those agreements. *See RLEA*, 833 F.2d at 704-05; *IBEW*, 829 F.2d at 1427; *Burlington Northern*, 829 F.2d at 619; *Machinists*, 830 F.2d at 747.

We have carefully evaluated the claims of the parties and examined the evidence in the record as to the terms of their collective bargaining agreements and the relevant past practices attendant to those agreements. There can be no doubt that the agreements and past practices arising thereunder embrace matters of job abolishment, layoff and reassignment resulting from a layoff with regard to the individuals affected by the Duck Creek South line sale who are able to retain their employment with C&NW. In addition, C&NW's claim that the agreements and attendant past practices extend to the related matters of its obligation to employees who are laid off after their positions are abolished appears to have at least some factual support.

It is true that the agreements are silent with regard to C&NW's obligation to provide, or its ability to avoid, the type of ameliorative, post-termination benefits sought by the RLEA unions. Thus, C&NW's contentions that the collective bargaining agreements contemplate abolishment of jobs without any of the severance-related benefits sought by the RLEA unions is based primarily, if not exclusively, on its claims as to the past practice or course of dealing under the provisions of the agreements that pertain to job abolishment and layoff. However, because nothing in the record indicates that the purported body of past practice relied on by C&NW is inconsistent with the express provisions of the agreements, this argument by C&NW cannot be rejected out of hand.

Our analysis leaves us convinced that even though C&NW's interpretation of the agreements and its contentions are subject to challenge, they are at least plausible. *See Machinists*, 830 F.2d at 748. Because C&NW's position has at least an arguable basis in the collective bargaining agreements and relevant past practice, it cannot be said to constitute the type of clear departure from those agreements necessary to trigger a finding of a § 6

major dispute under the RLA format. *See Brotherhood of Maintenance of Way Employees*, 802 F.2d at 1022.[2]

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[2] The primary focus of RLEA's concern with the proposed Duck Creek South line sale is the fact that the current collective bargaining agreements between C&NW and the RLEA unions do not provide their members who will lose their jobs with C&NW with the type of additional severance benefits formerly imposed as a matter of course by the ICC as a condition of approving a proposed rail line sale. The record indicates that former C&NW employees who go to work for FRVR will experience a reduction in pay and benefits and will lose the seniority standing they had accrued with C&NW. That the current collective bargaining agreements between C&NW and the RLEA member unions do not contain provisions pertaining to the pay, benefits and seniority standing of C&NW employees whose jobs are abolished and who subsequently accept employment with another rail carrier is not surprising.

RLEA attempts to bring the issues of the post-job abolition pay, benefits and seniority status of the individuals who will go to work for FRVR within the scope of the bargaining relationships between its constituent unions and C&NW by characterizing the change in the status of the current C&NW employees whose jobs with C&NW will be abolished by the Duck Creek South line sale as a "transfer" of their employment by C&NW to FRVR. That characterization is inaccurate. Those employees whose employment with C&NW is terminated who choose to accept positions with FRVR will not be transferred by C&NW. Their jobs with C&NW will be abolished. Thus, if and when the Duck Creek South line sale is consummated, CNW's actions as an employer rail carrier under the RLA will be limited to those concerned with the abolition of existing jobs and the layoff and/or reassignment of the employees whose positions are abolished. It is within this context that the minor dispute/major dispute determination called for by the RLA must be made in this case.

The actions of RLEA's member unions are understandable, especially in light of the ICC's current predisposition against imposing labor protective provisions as a prerequisite to approving rail line sales of the type at issue here. But in order to achieve the outcome sought by RLEA, *i.e.*, an order compelling C&NW to engage in negotiations under the § 6 RLA major dispute procedures and eventually submit its disagreements with the unions to the full range of dispute resolution devices provided thereunder, we must conclude that there are no bona fide issues of contract

Our precedent clearly dictates that in a circumstance such as the present one, where a rail carrier and a union(s) disagree as the proper categorization of a labor dispute under the RLA, the federal courts must delineate a matter a minor dispute unless the carrier's claims of contractual justification are so frivolous or obviously insubstantial as to indicate that it is attempting to circumvent the § 6 RLA major disputes resolution procedure. *Machinists*, 830 F.2d at 746, *RLEA*, 833 F.2d at 704; *Burlington Northern*, 829 F.2d at 619. This is particularly true in controversies involving job abolition. *Machinists*, 830 F.2d at 749 ("It has been held before that where a collective bargaining agreement is susceptible of a non-frivolous interpretation allowing job abolition, disputes over actions effecting such job abolition are minor."). Given the arguable contractual/past practice bases for C&NW's position, we cannot conclude that it is either frivolous or obviously insubstantial.

Juxtaposition of the foregoing analysis as to the nature of the present controversy between C&NW and the RLEA-represented unions with the precedent in our Circuit and the remaining body of relevant RLA law, compels us to agree with the district court's categorization of this matter as a minor dispute under the RLA.[3] The district court's holding to that effect will be affirmed.

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interpretation presented here. Given the nature and context of the current dispute between C&NW and the RLEA member unions, we are unable to reach that conclusion.

[3] We have carefully examined the three key cases relied on by RLEA to support its claim that this case involves a major dispute under the RLA and we believe that none of the three is pertinent to our analysis. *Railway Labor Executives Association v. Pittsburgh & Lake Erie Railroad Co. ("P&LE")*, 845 F.2d 420 (3d Cir. 1988), does present a fact situation similar to the present case. However, there are two distinct features of the fact situation in that case which distinguish it from our case. First, *P&LE* did not involve a rail carrier selling a small portion of its rail lines to a non-carrier. Rather, the rail carrier in *P&LE* proposed to sell its

C. The Remaining RLA Issues

The categorization of this matter as a minor dispute under the RLA establishes several additional facts relevant to our review of the district court's actions. First,

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entire rail operation to a non-carrier corporation. Second, and more importantly, there is no indication in the analysis by the Third Circuit in *P&LE* that it considered the effect of a claim by a rail carrier employer that its actions pertaining to the employees whose jobs were to be abolished by the proposed sale were sanctioned by and proper under the collective bargaining agreements between the carrier and the unions representing its employees.

The contractual base relied upon by C&NW is the key to our analysis of the minor dispute/major dispute bifurcation under the RLA scheme. Because the Third Circuit in *P&LE* did not address that topic in any way, we do not find its analysis of the minor dispute/major dispute RLA issue to be relevant or persuasive. We note further that the Third Circuit's subsequent decision in *Railway Labor Executives Association v. Consolidated Rail Corporation*, 845 F.2d 1187 (3d Cir. 1988), can also be distinguished from our case in that the Court therein determined that the issue in dispute, a drug testing program unilaterally instituted by the rail carrier, was not within the terms and conditions of employment incorporated in the parties' collective bargaining agreement. *Id.* at 1193-94. Unlike the Third Circuit in *Conrail*, we have determined that the issues in dispute in our case are at least arguably embraced within the scope of the collective bargaining agreements between the RLEA unions and C&NW.

We also believe that the holding of the Fifth Circuit in *United Industrial Workers v. Board of Trustees of the Galveston Wharves*, 351 F.2d 183 (5th Cir. 1965), is not relevant to our analysis. *Galveston Wharves* involved a rail carrier who was effectively terminating all of its rail operations by leasing its rail facilities to another corporation. The key to the Fifth Circuit's rejection of the rail carrier's claim that its dispute with the union representing its employees was not proper for submission to the NRAB was the finding that the carrier's action in leasing out its entire rail operation was neither a "layoff" nor an exercise of the carrier's management prerogatives under the collective bargaining agreement. *Id.* at 189. Rather, the Court viewed the carrier's action, and the dispute itself, as one involving the termination of a collective bargaining agreement that triggered the RLA § 6 major dispute resolution procedures. *Id.* at 189-90. Nothing in *Gal-*

because it involves a minor dispute, this controversy is within the exclusive jurisdiction of the NRAB. *RLEA*, 833 F.2d at 704. *See also Missouri Pacific Railroad Co. v. United Transportation Union*, 782 F.2d 107, 110 (8th Cir. 1986), *cert. denied*, —— U.S. ——, 107 S. Ct. 3209 (1987). *IBEW*, 829 F.2d at 1428 ("Minor disputes . . . must be referred to binding arbitration under the auspices of the National Railroad Adjustment Board.") The role of the federal courts in RLA minor disputes is very limited. Although they may determine the proper classification of a dispute under the RLA scheme, federal courts are prohibited from becoming involved in the merits of minor disputes. *Burlington Northern*, 829 F.2d at 620 ("The Railway Labor Act . . . prohibits federal courts from becoming involved in minor disputes. Minor disputes must be resolved through an arbitration process that is subject to very narrow judicial review."). Therefore, we conclude that the district court correctly determined that because the present controversy is a minor dispute under the RLA, it is subject to the exclusive jurisdiction of the NRAB, and must be resolved under the Act's § 3 RLA procedures. 45 U.S.C. § 153.

The second significant ramification of the minor dispute categorization pertains to the district court's determination that the strike threatened by the RLEA member unions should be enjoined. Strikes over minor disputes violate the RLA and may be enjoined by the federal courts in order to effectuate the RLA's purpose to provide for the compulsory arbitration of such matters by the NRAB. *Machinists*, 830 F.2d at 749 (citing *Chicago & Indian River*, 353 U.S. at 40-42, 77 S. Ct. at 640-41 (1957), and *Brotherhood of Locomotive Engineers v. Mis-*

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veston Wharves compels us to reach the result in a case, like ours, involving a sale by a rail carrier of a small portion of its track while maintaining the remainder of its rail operations and continuing to honor its collective bargaining agreements. Therefore, we deem that case inapposite here.

souri-Kansas-Texas Railway Co. (M-K-T), 363 U.S. 528, 531, 80 S. Ct. 1326, 1328 (1960)). *See also IBEW*, 829 F.2d at 1428; *Chicago & Northwestern Transportation Co. v. United Transportation Union*, 656 F.2d 274, 277 (7th Cir. 1981) (citing *Locomotive Engineers v. Louisville & Nashville Railroad Co.*, 373 U.S. 33, 83 S. Ct. 1059 (1963)).

Thus, it is clear that the federal courts may issue injunctions against strikes in minor disputes in order to protect the NRAB's exclusive jurisdiction over such matters. Because injunctions barring strikes in minor disputes are necessary to ensure the proper functioning of the § 3 RLA procedures, they are not proscribed by the *Norris-LaGuardia Act*. *Chicago River*, 353 U.S. at 40-41, 77 S. Ct. at 640-41. *See also Missouri Pacific Railroad Co.*, 782 F.2d at 110 (citing *Louisville & Nashville Railroad Co., supra*). For these reasons we must conclude that the district court acted properly in granting C&NW's motion for a preliminary injunction prohibiting the RLEA unions from striking during the pendency of the NRAB's adjudication of the current dispute.

One final question remains: the propriety of the district court's determination that it was without jurisdiction to grant RLEA's motion for a preliminary injunction to bar the Duck Creek South line sale. RLEA's argument in support of its motion is based solely on the claim that the present controversy is a major dispute under the RLA scheme. Once a district court finds that a major dispute exists, it may enjoin both the rail carrier and the union(s) from altering the status quo during the course of the negotiations and other impasse resolution procedures mandated by § 6 of the RLA. *Boston & Maine Corp.*, 788 F.2d at 797 (citing *Detroit & Toledo*, 396 U.S. at 155, 90 S. Ct. at 302). However, in the absence of a finding that a major dispute exists, a district court is without jurisdiction to issue a broad status quo injunc-

tion. *See Boston & Maine*, 788 F.2d at 797 (citing *Carbone v. Meserve*, 645 F.2d 96, 98 (1st Cir.), *cert. denied*, 454 U.S. 859, 102 S. Ct. 312 (1981). We have determined that the district court correctly categorized the parties' disagreements as to the proposed Duck Creek South line sale as a minor dispute. Accordingly, RLEA's claim that a status quo injunction of the type normally issued in RLA major disputes should have been granted by the district court in this case is moot and can be dismissed. The district court was without jurisdiction to issue such an injunction.[4]

It is true that the district court, in its discretion, could have conditioned the preliminary injunction barring the RLEA unions from striking on C&NW's abstention from consummating the Duck Creek South line sale.[5] In *Machinists*, *supra*, our Court observed that the Supreme Court has held that "if an injunction against strike activity is issued in a minor dispute the district court retains its traditional equitable power to balance 'competing claims of irreparable hardship' in light of the Railway Labor Act's mandate that the guideline for fashioning the injunction be preservation of the [NRAB's] jurisdiction." 830 F.2d at 750 (quoting *M-K-T*, 363 U.S. at 534-35, 80 S. Ct. at 1330). RLEA has failed to show

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[4] Because we find in the RLA sufficient basis for holding that the district court was without jurisdiction to issue the status quo injunction sought by RLEA, we need not address the district court's holding that it was without jurisdiction to issue that injunction because it deemed RLEA's motion therefor an impermissible collateral attack on the ICC order approving the Duck Creek South line sale.

[5] RLEA did not challenge the district court's refusal to indirectly proscribe the Duck Creek South line sale by conditioning the strike injunction on C&NW's willingness to postpone the sale until the NRAB procedures are completed. Nevertheless, to ensure a full and comprehensive treatment of the RLA issues presented by this case, we briefly address that question.

that a prohibition of the Duck Creek South line sale is necessary in order to preserve the NRAB's jurisdiction.

If the NRAB rejects C&NW's interpretation of the collective bargaining agreements and determines that the employees who are displaced by the challenged rail line sale are entitled to relief, it will be able to order the necessary payment of monies and adjustments in seniority levels it deems necessary to make those employees whole. Thus, it cannot be inferred that the legal remedy available to the RLEA unions in this case (via the NRAB arbitration procedure) is inadequate. Further, RLEA has failed to demonstrate that an order barring the Duck Creek South line sale during the pendency of the NRAB's adjudication of this controversy is necessary to prevent any irreparable harm to its constituent unions or the employees they represent. Accordingly, we cannot conclude that the district court abused its discretion when it failed to condition the preliminary injunction barring a strike in this dispute on a suspension of the Duck Creek South line sale.

IV

Based on the foregoing analysis, we will affirm the order of the district court granting C&NW's motion for a preliminary injunction barring the RLEA member unions from striking pending adjudication of the parties' dispute by the NRAB and denying RLEA's motion for a preliminary injunction barring the Duck Creek South line sale. The Railway Labor Act and the attendant relevant case law provide a full and proper basis for affirming the district court. Consequently, we need not resolve the additional issues, raised by the district court's opinion and addressed in the arguments of the parties, with regard to the effect of the Interstate Commerce Act.[6]

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[6] In their briefs, C&NW and Plaintiff-Intervenor/Appellee Interstate Commerce Commission ask us to decide two additional issues raised by the interface in this case between the Railway Labor

The order of the district court is AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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Act and the Interstate Commerce Act. Those issues go to two questions: (i) whether RLEA's attempt to enjoin the Duck Creek South line sale constitutes an impermissible collateral attack on the ICC's decision to allow the sale to proceed; and (ii) whether the strike threatened by the RLEA unions could properly be enjoined by the district court in order to preserve what the ICC and C&NW maintain is the Commission's exclusive jurisdiction to determine "labor protection disputes" pertaining to the sale of rail lines. In the above analysis, we have determined that the relevant provisions of the RLA mandate that the injunction sought by the RLEA not issue and that the strike threatened by the RLEA unions be enjoined. Accordingly, we need not address the two additional Interstate Commerce Act-related issues raised by appellees.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

PLUNKETT, Judge

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88 C 444

March 16, 1988

CHICAGO AND NORTHWESTERN TRANSPORTATION COMPANY, *et al.*

vs.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*

DOCKET ENTRY

(1) ☐ Judgment is entered as follows:

(2) ☒ [Other docket entry:]

Plaintiffs' motion for a preliminary injunction against a strike by its railroad unions is granted. Railway Labor Executives' motion for a preliminary injunction against the sale is beyond the jurisdiction of this court and is thus denied. Parties are to proceed with the rocolution [*sic*] of this dispute in accord with Section 3 of the Railway Labor Act. Oral motion Railway Labor Executives to certify record on appeal is granted.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CHICAGO AND NORTH WESTERN
TRANSPORTATION COMPANY,
Plaintiff, Counter-defendant,

vs.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Defendants, Counter-plaintiffs.

Docket No. 88 C 444

Chicago, Illinois
March 16, 1988

TRANSCRIPT OF PROCEEDINGS
BEFORE HONORABLE PAUL E. PLUNKETT

PRESENT:

For Chicago and North Western:

MR. STUART F. GASSNER and
MR. JAMES P. DALEY
One North Western Center,
Chicago, Illinois
and
MR. RALPH J. MOORE, JR.
Shea & Gardner
Washington, D.C.

For Railway Labor Executives & unions:

MR. JOHN O'B. CLARKE, JR.
Highsaw & Mahoney, P.C.
Washington, D.C.

For the Interstate Commerce Commission:

MR. CLYDE J. HART, JR.
Attorney, ICC, 12th Street &
Constitution Ave., N.W. Wash. D.C.

For FRVR:

MS. EILEEN KAMERICK
Skadden, Arps—
Chicago, Illinois
and
MR. STEPHEN M. OLSON
Kirkpatrick & Lockhart
Pittsburgh, Pa.

AND OTHERS not identified to record.

* * * *

[94] THE COURT: Well, I have written out what I can only say I hope the Seventh Circuit can understand. I guess I will begin by thanking the lawyers in this case for educating a United States District Court Judge whose background in labor law is suspect, to say the least. We really had to start from ground zero. We spent a good deal of time on this. It was made easier by the, what I perceive to be splendid briefs filed by all the parties in the case. If they hadn't been of that high quality, I am doubtful I could have resolved the issue.

I begin with the question of whether or not we should enjoin the sale that the North Western Railroad wishes to consummate next Monday, and that is somewhat out of order, but I begin with it because I perceive it to be the easiest.

I cannot, I do not believe, enjoin the sale because I do not believe that a district court has the power [95] to do so when that sale has been approved by the Interstate Commerce Commission. Title 28 U.S.C. S. 2343 provides that "the court of appeals has excluded [*sic*] jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" ICC orders.

We note that a majority of the district courts faced with a union's request to enjoin an Ex Parte No. 392 line sale have refused to do so on the ground that the requested injunction would constitute an impermissible collateral attack on an ICC order. You can see that in Decker vs. CSX Transportation, 672 F. Supp. 674, WDNY 1987, and a series of other cases which I won't stop to enunciate now, but which will be put in the record through Mr. Betz.

(The same to read as follows:)

UTU v. Burlington Northern Railroad, 672 F. Supp. 1579 (D. Mont. 1987), RLEA v. City of Galveston (S.D. Tex., Nov. 4, 1987); RLEA v. Chicago & NW Transportation Co., 124 LRRM 2715 (D. Minn., Jan. 7, 1987); Burlington Northern RR v. UTU (W.D. Mo. Aug. 29, 1986).

We agree with all these courts that the rationale of the Second Circuit's decision in RLEA vs. Staten Island, 792 Fed 2d 7, Second Circuit 1968 [*sic*], wherein it affirmed the district court's refusal to enjoin an ICC-approved sale on the ground that the issuance of an injunction would constitute an impermissible collateral attack on an ICC order, [96] and that such a rule applies even where the transaction has not yet been consummated and the ICC's order approving the sale is not mandatory.

We simply disagree with the decision in RLEA vs. Pittsburgh & Lake Erie Railroad, where the court enjoined a similar line sale. That court, we believe, impermissibly allowed a collateral attack or the ICC order.

In short, we decline to enjoin this line sale because we believe that we do not have the power to issue an injunction against the consummation of such an ICC-approved sale.

That brings us to the issue of whether we should enjoin the threatened strike by the railroad unions. Initially we reject the idea that the Norris-LaGuardia Act must be or even can be "accommodated to" Section 10901 of the Interstate Commerce Act or the Interstate Commerce Act in general; in fact, we find that the anti-injunction provisions of the Norris-LaGuardia Act are not subordinated to or accommodated to the Interstate Commerce Act generally or Section 10901 in particular.

Neither the Interstate Commerce Act in general nor Section 10901 in particular is a comprehensive labor statute providing an alternative mechanism of dispute resolution which Congress could have intended to override the Norris-LaGuardia Act.

[97] We therefore find the Third Circuit's decision in Railway Labor Executives' Association vs. P&LE, 831 Fed 2d, 1231, Third Circuit 1987, persuasive on this point. We agree with that court that the Interstate Commerce Act is not comparable to the Railway Labor Act, parts of which are accommodated to the Norris-LaGuardia Act, for the ICA does not, unlike the Railway Labor Act, contain a comprehensive scheme of alternative dispute resolutions.

We decline to apply the Eighth Circuit's decision in Missouri Pacific Railroad Company vs. United Transportation Union, 782 Fed 2d 107, Eighth Circuit 1986, to this case. It is distinguishable on the ground that it involved Section 11341(a) of the Interstate Commerce Act, which, unlike Section 10901, requires the ICC to impose employee protective conditions. Also, we simply have doubts that that decision is correct.

Unlike the Eighth Circuit, we cannot find that the ICA is a labor statute. The ICA's provision for mandatory or discretionary power to deal with labor problems

under the aegis of a railroad sale, abandonment or reorganization does not in our view convert that statute into a comprehensive labor act. The whole purpose of the ICA is to protect the public interest by protecting and fostering railroads. The concerns with labor, while perhaps not peripheral, are not central.

[98] We do find, however, that the strike must be, and hereby is, enjoined under the Railway Labor Act. Under that act, the dispute before us is properly categorized as minor, rather than major, and the union is therefore enjoined from a strike over the sale, the loss of jobs or other effects of the sale.

A major dispute is a dispute over the formation or alteration of a collective bargaining agreement, while a minor dispute is a disagreement over the interpretation or application of such an agreement. Elgin, Joliet & Eastern Railway vs. Burley, 325 US 711 at 723, 1946.

The rules established in this circuit for determining whether a dispute is major or minor are as follows: The Seventh Circuit has indicated that the magnitude of the impact on the railroad's operation and, indeed, the union's interests is unlikely to affect the characterization, because the distinction turns on whether reference to the collective bargaining agreement will resolve the dispute. National Railway Labor Conference vs. International Association of Machinists, 830 Fed 2d 741 at 747, note 5, Seventh Circuit 1987. There the Court stated:

> "To ascertain if a dispute is major or minor, the Court must determine whether or not the dispute can be resolved by reference to an existing collective bargaining agreement. If, as here, the parties [99] disagree as to this, the dispute is minor unless the carrier's claims of contractual justification are 'frivolous' or 'obviously insubstantial.' "

The fact that a carrier's contract interpretation is questionable, and may be wrong, does not make it frivolous.

Furthermore, because any major dispute can escalate into a strike, if there is any doubt as to whether a dispute is major or minor, a court should construe the dispute to be minor. Norfolk & Western, 833, Fed 2d at 705.

Rail labor argues that the railroad's attempt to abolish jobs as a result of the line sale without first bargaining with the union is an attempt to effectuate a unilateral change in rates of pay, rules or working conditions, therefore, it is an alteration of the contract and therefore a major dispute.

The railroad, on the other hand, claims that this is a minor dispute because it concerns the interpretation or application of the reduction in force clauses of the contracts between the railroad and the unions. These reduction in force clauses, bargained for and accepted by the unions, state that when reductions in force or job abolishments become necessary, the employees will be given notice (generally five days) and the layoffs will be made in accordance with the seniority system.

[100] The railroad contends that job abolishments are clearly contemplated under these provisions and that the railroad therefore has the authority to implement the job abolishments which will result from this line sale without first bargaining with the union.

As we said, we believe that this is a minor dispute, because the railroad's claims of contractual justification are not "frivolous" or "obviously insubstantial." It is, of course, questionable as to whether or not the reduction in force provisions encompass layoffs which result from this particular situation, namely, the sale of a line, a situation which is not necessarily treated the same way as an abandonment under the agreements.

The union has essentially agreed in its contracts with the railroad that the C&NW may make any cutbacks necessary to remain profitable—for instance, through abandonment. The union argues, however, that the Duck Creek South line is still "marginally profitable" and that

a sale is quite different than abandonment because the railroad is not just closing down a line, but selling it, presumably under favorable terms.

The union may be correct, but it is not our prerogative to decide such a dispute. While the railroad's interpretation of the contract is subject to question, "the fact that a contract interpretation is questionable, and may [101] be wrong, does not make it frivolous." Again, National Railway Labor Conference vs. International Association of Machinists, 830 Fed 2d 741 at 749, Seventh Circuit 1987.

The Supreme Court has deemed disputes minor where "the dispute relates either to the meaning or proper application of a particular provision with reference to a particular situation or to an omitted case." Elgin, 325 US at 723.

We therefore conclude that this dispute should be characterized as minor.

We note that the railroad also contends that it has a past practice of abolishing jobs without bargaining with the union and that this practice is incorporated into the contract, therefore justifying its actions in regard to this line sale. In regard to past practice, we are well aware that the arguments from past practice will often have only a limited impact on the characterization of a dispute. Labor Conference, 830 Fed 2d at 746-47; Norfolk & Western, 833 Fed 2d at 705, Note 4.

However, where the contract is silent on a particular issue, past practice may be considered of some relevance in characterizing the dispute. Norfolk & Western, 833 Fed 2d at 705, note 4. Here it is of course subject to question whether the railroad's past practice of abolishing jobs without first bargaining with the union in connection [102] with abandonments has become part of the contract, and, if so, whether that practice also establishes a contractual right to abolish jobs or lay off employees without first bargaining in connection with a line sale. However, it seems to us that the railroad's past

practice is of at least some relevance here and may arguably bolster their contractual justification argument.

We wish to make it clear that we believe the contractual language alone is enough to make the railroad's argument of contractual justification non-frivolous. Nonetheless, its argument from past practice seems to us at least marginally relevant to its contractual justification argument and reinforces our thinking that this is indeed a minor dispute because it can be resolved with reference to the collective bargaining agreement.

Because minor disputes are within the exclusive jurisdiction of the Railway Adjustment Board, federal courts may issue injunctions against strikes arising out of minor disputes. Brotherhood of Rail Trainmen vs. Chicago River at 353 US 30, 1957. As stated, we therefore enjoin the threatened strike.

While we might like to, we do not condition our injunction against the strike. We recognize that a district court enjoining a strike over a minor dispute retains its traditional equitable powers and may condition that injunction [103] in order to ensure fairness and to protect the jurisdiction of the Adjustment Board over the dispute. Labor Conference, 830 F. 2d at 746-47; Norfolk and Western 833 F. 2d at 705, n.4.

However, we also recognize that this power is limited and that a court generally should not condition an injunction against a strike over a minor dispute on the maintenance of the status quo. See National Railway Labor Conference, 830 F. 2d at 749 and Railway Labor Executives' Association vs. Norfolk and Western Railway, 833 F. 2d 700 at 708, Seventh Circuit, 1987.

Moreover, as we explained earlier in connection with our refusal to enjoin the sale, we believe that a district court lacks the jurisdiction to enjoin a sale already approved by the ICC. Any relief sought by the union to maintain the status quo must come, if at all, from the Seventh Circuit.

As a result, we conclude that the Chicago and North Western's motion for a preliminary injunction against a strike by its railroad unions is granted. Rail labor's motion for a preliminary injunction against the sale is beyond the jurisdiction of the Court and denied. CN&N [*sic*] and [104] rail labor are to proceed with the resolution of this dispute in accordance with Section 3 of the Railway Labor Act.

* * * *

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

August 23, 1988

Before

Hon. HARLINGTON WOOD, JR., *Circuit Judge*

Hon. MICHAEL S. KANNE, *Circuit Judge*

Hon. JESSE E. ESCHBACH, *Senior Circuit Judge*

No. 88-1504

CHICAGO AND NORTH WESTERN
TRANSPORTATION COMPANY,
FRVR CORPORATION and
INTERSTATE COMMERCE COMMISSION,
Plaintiffs-Appellees,

vs.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division

No. 88 C 444—PAUL E. PLUNKETT, Judge

JUDGMENT—ORAL ARGUMENT

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion on this Court filed this date.

APPENDIX D

Statutes Relied Upon

I. Railway Labor Act, 45 U.S.C. § 151, *et seq.* (Excerpts)

A. Section 2 First

45 U.S.C. § 152 First

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

B. Section 2 Seventh

45 U.S.C. § 152 Seventh

No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.

C. Section 3

45 U.S.C. § 153

First. There is hereby established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after approval of this Act, and it is hereby provided—

(a) That the said Adjustment Board shall consist of thirty-four members, seventeen of whom shall be selected by the carriers and seventeen by such labor organizations of the employees, national in scope, as

have been or may be organized in accordance with the provisions of section 2 of this Act.

(b) The carriers, acting each through its boards of directors or its receiver or receivers, trustee or trustees or through an officer or officers designated for that purpose by such board, trustee or trustees or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the divison on which each such representative shall serve, but no carrier or system of carriers shall have more than one voting representative on any division of the Board.

(c) Except as provided in the second paragraph of subsection (h) of this section, the national labor organizations, as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization shall have more than one voting representative on any division of the Board.

(d) In case of a permanent or temporary vacancy on the Adjustment Board, the vacancy shall be filed by selection in the same manner as in the original selection.

(e) If either the carriers or the labor organizations of the employees fails to select and designate representatives to the Adjustment Board, as provided in paragraphs (b) and (c) of this section, respectively, within sixty days after the passage of this Act, in case of any original appointment to office of a member of the Adjustment Board, or in case of a va-

cancy in any such office within thirty days after such vacancy occurs, the Mediation Board shall thereupon directly make the appontment and shall select an individual associated in interest with the carriers or the group of labor organizations of employees, whichever he is to represent.

(f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such representative, together with a representative likewise designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member, investigate the claims of the labor organization desiring participation and decide whether or not it was organized in accordance with section 2 hereof and is otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board and the findings of such boards of three shall be final and binding.

(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of (f) of this section shall receive from the Mediation Board such compensation as the

Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party.

(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers, that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of eight members, four of whom shall be selected and designated by the carriers and four of whom shall be selected and designated by the labor organizations, national in scope and organized in accordance with section 2 hereof and which represent employees in engine, train, yard, or hostling service; Provided, however, That each labor organization shall select and designate two members on the First Division and that no labor organization shall have more than one vote in any proceedings of the First Division or in the adoption of any award with respect to any dispute submitted to the First Division: Provided further, however, That the carrier members of the First Division shall cast no more than two votes in any proceedings of the division or in the adoption of any award with respect to any dispute submitted to the First Division.

Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers,

car men, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

Fourth Division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party

to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: Provided, however, That except as provided in paragraph (h) of this section, final awards as to any such dispute must be made by the entire division as hereinafter provided.

(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as "referee", to sit with the division as a member thereof and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this Act for the appointment of arbitrators and shall fix and pay the compensation of such referees.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(n) A majority vote of all members of the division of the Adjustment Board eligible to vote shall be competent to make an award with respect to any dispute submitted to it.

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named. In the event any division determines that an award favorable to the petitioner should not be made in any dispute referred to it, the division shall make an order to the petitioner stating such determination.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of

the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the divison of the Adjustment Board shall be conclusive on the parties, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board: Provided, however, That such order may not be set aside except for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in the United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the pro-

ceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of title 28, United States Code.

(r) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

(s) The several divisions of the Adjustment Board shall maintain headquarters in Chicago, Illinois, meet regularly, and continue in session so long as there is pending before the division any matter within its jurisdiction which has been submitted for its consideration and which has not been disposed of.

(t) Whenever practicable, the several divisions or subdivisions of the Adjustment Board shall be supplied with suitable quarters in any Federal building located at its place of meeting.

(u) The Adjustment Board may, subject to the approval of the Mediation Board, employ and fix the compensations of such assistants as it deems necessary in carrying on its proceedings. The compensation of such employees shall be paid by the Mediation Board.

(v) The Adjustment Board shall meet within forty days after the approval of this Act and adopt such rules as it deems necessary to control proceedings before the respective divisions and not in conflict with the provisions of this section. Immediately following the meeting of the entire Board and the adoption of such rules, the respective divisions shall meet and organize by the selection of a chairman, a vice chairman, and a secretary. Thereafter each division shall annually designate one of its members to act as chairman and one of its members to act as vice chairman: Provided, however, That the chairmanship and vice-chairmanship of any division shall alternate as between the groups, so that both the chairmanship and vice-chairmanship shall be held alternately by a representative of the carriers and a representative of the employees. In case of a vacancy, such vacancy shall be filled for the unexpired term by the selection of a successor from the same group.

(w) Each division of the Adjustment Board shall annually prepare and submit a report of its activities to the Mediation Board, and the substance of such report shall be included in the annual report of the Mediation Board to the Congress of the United States. The reports of each division of the Adjustment Board and the annual report of the Mediation Board shall state in detail all cases heard, all actions taken, the names, salaries, and duties of all agencies, employees, and officers receiving compensation from the United States under the authority of this Act, and an account of all moneys appropriated by Congress pursuant to the authority conferred by this Act and disbursed by such agencies, employees, and officers.

(x) Any division of the Adjustment Board shall have authority, in its discretion, to establish regional adjustment boards to act in its place and stead for

such limited period as such division may determine to be necessary. Carrier members of such regional boards shall be designated in keeping with rules devised for this purpose by the carrier members of the Adjustment Board and the labor members shall be designated in keeping with rules devised for this purpose by the labor members of the Adjustment Board. Any such regional board shall, during the time for which it is appointed, have the same authority to conduct hearings, make findings upon disputes and adopt the same procedure as the division of the Adjustment Board appointing it, and its decisions shall be enforceable to the same extent and under the same processes. A neutral person, as referee, shall be appointed for service in connection with any such regional adjustment board in the same circumstances and manner as provided in paragraph *(l)* hereof, with respect to a division of the Adjustment Board.

Second. Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this Act, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been

pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon any such representative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made. The cases which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier or such representative fails to agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the special board, shall constitute the board. Each member of the board shall be compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board. If they are unable to agree such matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member of the board when he has determined such matters. If with respect to any dispute or group of disputes the members of

the board designated by the carrier and the representative are unable to agree upon an award disposing of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon an award, to agree upon the selection of such neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day, named. Compliance with such awards shall be enforcible by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board.

C. Section 6

45 U.S.C. § 156

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being

held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

II. Norris-LaGuardia Act, 29 U.S.C. § 101 *et seq.* (Excerpts)

A. Section 2

29 U.S.C. § 102

In the interpretation of this Act and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are herein defined and limited, the public policy of the United States is hereby declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that we have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the

following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are hereby enacted.

B. Section 8

29 U.S.C. § 108

No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.

APPENDIX E

Railway Labor Executives' Association
Member Organizations

*American Railway & Airway Supervisors Association (Division of TCU);

*American Train Dispatchers Association;

*Brotherhood of Locomotive Engineers;

*Brotherhood of Maintenance of Way Employes;

*Brotherhood of Railroad Signalmen;

*Brotherhood Railway Carmen (Division of TCU);

*Hotel Employees and Restaurant Employees International Union;

*International Association of Machinists and Aerospace Workers;

*International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers;

*International Brotherhood of Electrical Workers;

*International Brotherhood of Firemen & Oilers;

International Longshoremen's Association;

National Marine Engineers' Beneficial Association;

*Railroad Yardmasters of America (Division of UTU);

Seafarers International Union of North America;

*Sheet Metal Workers' International Association;

Transport Workers Union of America;

*Transportation•Communications Union (TCU); and

*United Transportation Union.

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* Those RLEA member organizations which represent employees on respondent C&NW and are individual petitioners herein are designated by asterisks.